

SOUTH AFRICA / JUDGMENT

Ranoto and Others v City of Tshwane Metropolitan Municipality (56794/2020) [2024] ZAGPPHC 1278 (29 November 2024) [2024] ZAGPPHC 1278

COURT

North Gauteng High Court, Pretoria

BEFORE

M.R Moleleki

CASE / FILE NUMBER

56794/2020

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FLYNOTES:

PERSONAL

INJURY – Shooting – Necessity

–

Loss

of support claim for widow and two children – Metro police
pursuing vehicle – Passenger shooting at officers

–

Sudden and unexpected situation – Passenger wounded and
driver killed by police gunfire – Dagga found
in vehicle –Shooting was necessary for officer to avert attack on himself and
colleague – Without wrongful act,

no cause of action for

loss of support – Dependants' claims cannot succeed –

Passenger's claim also

not succeeding.

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 56794/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE: 29 November 2024

SIGNATURE: M.R MOLELEKI
In

the matter between: MOSIMA
REBECCA RANOTO
First Plaintiff
MOSIMA
REBECCA RANOTO obo DFFR
Second Plaintiff
MOSIMA
REBECCA RANOTO obo OER
Third Plaintiff
FRANS RANTOKWANE RANOTO
Fourth Plaintiff
and
THE
CITY OF TSHWANE METROPOLITAN MUNICIPALITY
Defendant

JUDGMENT

Moleleki, AJ

Introduction

- [1] The plaintiffs’ claim damages resulting from a shooting incident that occurred on 19 May 2019 at approximately 19h00 when Tshwane Metro Police officers (the Metro Police Officers), acting within the course and scope of their employment with the defendant, fired gunshots at a red Renault Clio motor vehicle (the incident). This resulted in the deceased sustaining fatal bodily injuries, in consequences of which he died at Steve Biko Academic Hospital. The fourth plaintiff sustained a gunshot wound to the right hand.
- [2] The first plaintiff is the widow of the deceased. She lodged a claim for loss of support both in her personal capacity as the deceased’s wife as well as in her representative capacity, as mother and natural guardian of her two minor children.
- [3] The fourth plaintiff instituted action for damages in this court under case number 7682/2021, claiming damages resulting from the injury he sustained to the right hand.
- [4] Both actions were consolidated in terms of a court order dated 25 July 2024. The consolidated actions proceeded under case number 56794/2020 with the fourth plaintiff being added as such in case number 56794/2020 (the consolidated action).

- [5] At the commencement of the trial and by agreement between the parties, the court ordered that the merits and quantum be separated in terms of Rule 33(4) of the Uniform Rules of Court. The matter is therefore proceeding on the issue of merits only. The question of quantum stands over for determination at a later date.
- [6] The first and fourth plaintiffs testified and called three other witnesses. Two Metro Police Officers testified on behalf of the defendant.
- [7] Common cause facts and/or not in dispute are as follows:
- that the court has jurisdiction to entertain the matter;
 - that the plaintiffs have the necessary locus standi in judicio;
 - that the shooting incident occurred near the intersection between the R55 and Schurweberg Road, Laudium, Pretoria on 19 May 2019;
 - that the deceased was the driver of the red Clio motor vehicle and he died due to the injuries suffered as a result of the gunshot wound sustained during the incident; and
 - that the red Clio was damaged as a result of the incident.

Issues in dispute

- [8] The main issues in dispute are the following:
- whether as a result of the incident, the fourth plaintiff sustained the injuries outlined in paragraph 8 of his particulars of claim; and
 - whether the shooting at the red Clio can be justified due to the defences raised by the defendant.

The defendant's plea

- [9] The facts pleaded by the defendant to justify the actions of the Metro Officers in firing shots as set out in paragraph 3 of the plea are as follows:
- the Metro Police Officers had reasonable grounds to believe that the occupants of the red Clio were committing, or attempted to commit an offence or offences in their presence;
 - the Metro Police officers used such force as was reasonable and necessary to arrest the occupants of the red Clio and to prevent them from fleeing;
 - the Metro Police officers used such force as they were authorised to use, and as was reasonable and necessary in the circumstances;
 - the occupants of the red Clio posed a threat of violence to the metro

Police Officers and/or to others and/or were reasonably suspected of having committed a crime involving the infliction of or threatened

infliction of serious bodily harm and there was no other reasonable means of arresting the occupants of the red Clio other than by firing at the vehicle; and

e. the actions of the Metro Police Officers in firing at the red Clio were necessary for their own protection.

[10] In many respects the version of the Metro Police Officers and that of the plaintiffs are irreconcilable and mutually destructive. However, as stated, certain background facts are either common cause or indisputable. These facts provide a framework for a proper understanding of events leading to the incident. I shall set them out below.

Background Facts

[11] The first plaintiff testified that the fourth plaintiff is her uncle. They reside in detached houses within the same premises. On the morning of Sunday, 19 May 2019, the fourth plaintiff left together with the deceased to visit family in Atteridgeville. It was her wish to go with them, but they refused her permission to go with them. During the evening at around 20h00, the fourth plaintiff arrived home alone and on foot. The fourth plaintiff informed her that he and the deceased had been shot at by the Metro Police Officers whilst travelling back home. Further that when he left the scene, he noticed the paramedics arriving and assured the first plaintiff that the deceased would receive medical care. The fourth plaintiff sustained injuries on the hand. The first plaintiff made a telephone call to her brother requesting him to avail his motor vehicle to take the fourth plaintiff to hospital. It took about three hours for her brother to arrive. It was only around 23h00 when the fourth plaintiff was taken to hospital. By then, she had also received a phone call from Steve Biko Academic Hospital requesting her to go sign consent forms authorising the hospital to carry out appropriate procedures on the deceased. They drove past the scene of the incident on their way to hospital. Her husband's red Clio was still at the scene and so were members of the South African Police Services.

[12] The fourth plaintiff's testimony is that, whilst he and the deceased were travelling in the red Clio, he heard a siren go on just before they reached a stop sign. They drove past the stop sign. The deceased did not stop immediately as they were still trying to secure a proper place for them to stop. When they were supposed to stop, he

heard sounds of gunshots. When he heard the first gunshot the red Clio was on the side of the road. He denied that the deceased started speeding when they were stopped by the Metro Police Officers. The fourth plaintiff conceded that he could not rule out the possibility that blue lights had also been turned on by the Metro Police Officers. He was clear that when he heard the siren go on it occurred to him that it was the police officers. When the shooting had stopped, he remained in the vehicle for about 15 minutes. The deceased informed him that he had been shot at, even though he did not state where exactly. The fourth plaintiff had himself sustained a non-

penetrative wound, which he says he sustained whilst he had raised his hands up as a sign of surrender. The bullet skidded through between the small and the ring fingers. He stated that he was shocked by the incident. After about 15 minutes he alighted, went to the back of the red Clio where the Metro Police vehicle had become stationary. He confronted one of the Metro Police Officers who was at the cargo base of the Metro Police van and asked him why they were shooting at them. Thereafter, he walked away to go report the incident to the first plaintiff.

[13] Sergeant Tendani Tshililo, a member of the South African Police Services stationed at Laudium police station testified that they received information relating to a shooting incident that had just occurred. He, together with his crew member, Sergeant Skapula proceeded to the scene, which is about a kilometre and a half away from the police station. Upon his arrival the Metro Police Officers were at the scene. He did not approach them. He instead went to the deceased, who was at the time being attended to by the paramedics. He noticed that the deceased had a bullet wound to the back. He also noticed bullet holes at the back of the red Clio. He however did not notice any spent cases and did not specifically look for them as the

scene had been cordoned off to preserve evidence. What he did notice was a plastic bag of dagga in the red Clio.

[14] Sergeant Phuti Nelson Mashala, a member of the South African Police Services, with 22 years of experience arrived at the scene at approximately 20h05. Upon his arrival he interviewed the Metro Police Officers, Constables Thoka and Telile who informed him that the occupants of the red Clio fired shots at them, and they fired back. He did not check for bullet casings as it was the duty of the photographer to do so.

[15] A photographer in the South African Police Services, Warrant Officer Mbongeni Mabena testified that he could not tell, by looking at the bullet holes in the red Clio, whether the bullets were shot from inside or outside the red Clio. According to Warrant Officer Mabena, this falls within the domain of a ballistic expert. There were no spent casings found at the scene. He stated that a revolver does not release spent cases but keeps them within the cylinder. There was a plastic bag of dagga inside the red Clio, half the size of a soccer ball. He commented on the condition of the shattered back window of the red Clio. According to his observation it was likely shattered by bullets during a vehicle chase.

[16] That concluded the plaintiffs' case

[17] Officer Phethiwe Paul Telile, a Constable in the Tshwane Metro Police Department testified on behalf of the defendant. He stated that he, together with his colleague, Constable Thoka were on crime prevention patrol around Laudium, Pretoria. They noticed a red Renault Clio at a robot-controlled intersection of R55 and Schurweberg Road. They were all travelling in the same direction. The red Clio was on the right lane which is a lane for vehicles turning right. Constable Telile was the driver of the Metro Police vehicle. When he looked at the red Clio which was stationary on his right side, he noticed that there was no licence disc on the left-hand side of the windscreen. Since he was charged with the driving, he requested

Constable Thoka to put on the blue light and signal to the occupants of the red Clio to turn right on to Schurweberg Road and stop. The deceased, the driver of the red Clio failed to stop as instructed, instead he accelerated the speed and fled. The Metro Police Officers turned the siren on, and a chase ensued.

- [18] After about a kilometre, the fourth plaintiff started shooting at the Metro Police Officers. Constable Thoka, who was a front seat passenger retaliated by firing shots towards the red Clio. The red Clio eventually moved out of the road. Before it could come to a dead stop, the fourth plaintiff jumped out and disappeared into the nearby bush. For their safety, they did not pursue the fourth plaintiff as it was dark.
- [19] Constable Thoka testified that at all material times, he was in the company of Constable Telile. He largely corroborates the circumstances surrounding the shoot-out as intimated by Constable Telile. He also confirms Constable Telile's evidence that the fourth plaintiff fired shots towards the Metro Police vehicle first where after, Constable Thoka fired back. Constable Thoka testified that he saw a hand protruding from the front passenger seat of the red Clio. He saw a firearm in the hand of the passenger. He also saw sparks caused by the firearm being fired. The Metro Police Officers denied that they intentionally and without just cause shot at the fourth plaintiff and the deceased.

The Law

- [20] The fourth plaintiff bears the onus to prove on a balance of probabilities whether, as a result of the incident, he sustained the injuries outlined in paragraph 8 of his particulars of claim.
- [21] It is trite that every infringement of bodily integrity of another is prima facie unlawful. It is for the plaintiff to establish the fact of physical interference. Once infringement is proved, the onus of alleging and proving an excuse or justification for the assault rests on the defendant[1].
- [22] Where self-defence has been pleaded, it is generally upon the defendant to prove that the force used in defending himself was in the circumstances, reasonable and commensurate with the plaintiff's alleged aggression. The test for determining self-defence is objective, that is, whether a reasonable person in the position of the defendant would have considered that there was a real risk that death or serious injury was imminent.[2]
- [23] The court in *Zandisile Ntsomi v The Minister of Law and Order*[3] confirmed the principle that it must carefully position itself to assess the circumstances objectively when confronted with acts purported to constitute self-defence as follows;

"The very objectivity of the test, however, demands that when the Court comes to decide whether there was a necessity to act in self-defence it must place itself in the position of the person claiming to have acted in self-defence and consider all the surrounding factors

operating on his mind at the time he acted. The Court must be careful to avoid the role of the armchair critic wise after the event,

weighing the matter in the secluded security of the Courtroom... Furthermore, in judging the matter it must be ever present to the mind of the judge that, at any rate in the particular circumstances of this case, the person claiming to act in self-defence does so in an emergency, the creation of which is the work of the person unlawfully attacking. The self-defender is accordingly entitled to have extended to him that degree of indulgence usually accorded by the law when judging the conduct of a person acting in a situation of imminent peril...”

[24] Where the threatened harm can be avoided without the use of force, self-defence cannot succeed. When force is necessary to neutralise the threat of harm, the force must not be more than is reasonable to achieve that purpose.[4]

[25] The defendant must also satisfy the requirements laid down in section 49(2) of the Criminal Procedure Act[5]. In terms of section 49(2) the use of deadly force likely to cause either the suspect’ death or grievous bodily harm is justified only in limited circumstances. There must be acceptable evidence that the Metro Police Officers believed on reasonable grounds that the use of a firearm to prevent the occupants of the red Clio from fleeing or resisting or firing gunshots, was immediately necessary for their own protection.

[26] The version presented by the parties before the court was mutually destructive. The court is therefore called upon to decide the matter based on inherent probabilities. It was stated in National Employers’ General Insurance Co. Ltd; [6]

“...where there are two mutually destructive stories the plaintiff can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false and mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test plaintiff’ allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case, more than they do the defendant’s, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that the evidence is true and that his defendant’s version is false”

[27] In SFW Group Ltd and Another v Martell et Cie and Others 2003

(1) SA 11 (SCA), guidelines are furnished regarding the manner in which irreconcilable opposing versions should be evaluated and, this is set out as follows:

“...The technique ... generally employed by courts in resolving factual disputes where there are two irreconcilable versions ... may be summarised as follows: To come to a conclusion on the disputed issues, the court must make findings on| (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities...”

- [28] As to (a), the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness...That, in turn, will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions,
- (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events...
- [29] As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof...
- [30] As to (c), this necessitates an analysis and evaluation of each party's version on each of the disputed issues...

In the light of its assessment of (a), (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it....".

- [31] In *S v Trainor* 2003 (1) SACR 35 (SCA), in dealing with the correct approach to be adopted in cases involving mutually destructive and irreconcilable factual accounts, the Supreme Court of Appeal quoted with approval, and applied, the dictum in *S v van der Heyden* and then went on to state the following:

"... A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety..."

Evaluation

- [32] The three witnesses who testified on behalf of the plaintiffs could not take the plaintiffs' case any further. None of them were able to testify whether the bullet holes on the red Clio were as a result of gunshots fired by the Metro Police officers only, or whether some could have come from the inside of the red Clio directed towards the Metro Police Officers. The plaintiffs did not call any expert witnesses regarding the trajectory of the bullets and to explain the angle at which they were fired. This is within the expertise of ballistic experts. The photographs introduced as evidence were not of any assistance either.

- [33] The fourth plaintiff conceded that the deceased did not stop the vehicle immediately when instructed to do so by the Metro Police Officers. Warrant Officer Mabena' observation of the back windscreen of the red Clio was that it was likely shattered by bullets during a vehicle chase. I accept the evidence of the Metro Police Officers that the scene was mobile.
- [34] It is the defendant's version that its officers acted in self-defence by shooting at the occupants of the red Clio. The defendant's version is further that, because of the aggression of the fourth plaintiff, Constable Thoka deemed it necessary to apply force by shooting at the red Clio.

Context

- [35] The probabilities must be weighed within the context of the chronological sequence of events. From the time the Metro Police Officers signalled for the deceased to stop his vehicle and thereafter fleeing, the deceased could be considered to have committed an act of resistance. At the time when the chase ensued, the Metro Police officers had reasonable ground for suspecting that the occupants of the red Clio, the deceased in particular, had committed an offence of driving a motor vehicle that did not display a licence disc on the windscreen or failing to stop when instructed by law enforcement officers to do so.
- [36] The deceased was in a position to avoid the damages suffered. Had he simply stopped when directed to do so, it is unlikely that a vehicle chase would have ensued and most probably the shooting would not have occurred.
- [37] Similarly, the fourth plaintiff was in a position to avert the damages he suffered had he not fired shots at the Metro Police Officers. If his evidence were to be accepted, it would show that Constable Thoka was trigger happy and was intent on shooting at them for no apparent reason. If Constable Thoka was out to shoot at them as the fourth plaintiff wants this court to believe, he could have done so when, according to the fourth plaintiff's evidence, he confronted him to ask why Constable Thoka was shooting at them.
- [38] The probabilities favour the version of the Metro Police Officers that the fourth plaintiff is the one who fired the first shot at them. The evidence of the fourth plaintiff is unsatisfactory and improbable that he would confront the Metro Police Officers after they had fired shots at him and the deceased. I find it illogical that the fourth plaintiff would have walked towards the Metro Police vehicle and its occupants, when he says they had been shooting at them. Even so, they could have shot at him.
- [39] What makes the fourth plaintiff's evidence even less probable is that it was never put to the Metro Police Officers that Constable Thoka was at the cargo base of the Metro Police vehicle at all material times. On the same breadth, it is inexplicable why Constable Thoka would sit at the back of the van at night and whilst there were only two of them travelling in the Metro Police van.

- [40] I am satisfied that it is the fourth plaintiff who fired at the Metro Police Officers first. His denial that he fired shots from the red Clio is rejected. It is not in dispute that he was the front seat passenger in the red Clio. After the shooting had stopped, he alighted from the red Clio. On his own version, he was aware from the onset that the vehicle which had the siren on was driven by Metro Police Officers.
- [41] The conduct of the fourth plaintiff is inconsistent with that of a person who had been shot at and whose close relative (the deceased), was also injured. He left the scene, had no concern for the well-being of the deceased and did not attempt to get any form of assistance for him.
- [42] The fourth plaintiff decided to take a thirty-minute walk to go report the incident to the first plaintiff. This he did even though the police station was a mere kilometre away from where the shooting took place. When he so left the scene of the incident, he was aware that the deceased had been shot. He chose not to report the incident to the police officers, neither did he call an ambulance for the deceased to receive medical care. There is an inconsistency in this

regard in that the first plaintiff stated that the fourth plaintiff informed her that the paramedics were at the scene when he left. This he refuted in his testimony. Three hours later, he together with the first plaintiff drove past the scene of the shooting. They did not stop to report the incident to members of the South African Police Services who were at the scene.

- [43] If the fourth plaintiff was innocent in his actions, he could have remained at the scene. He left the scene; did not go to the police station which was much closer to the scene; upon his arrival at home, he and the first plaintiff decided to call the first plaintiff's brother and not the police nor did he stop at the scene on his way to hospital to enquire about the condition of the deceased. I cannot understand why the fourth plaintiff would, on his own version have gone home for the express purpose of going to report the incident to the first plaintiff. It seems to me far more likely that the fourth plaintiff and the deceased were intent on evading the Metro Police Officers.
- [44] All this is consistent with the probable actions of a person who had been on the wrong side of the law. It is not in dispute that dagga was found in the red Clio. This explains why its occupants desperately sought to avoid the Metro Police Officers. It is not in dispute that no charges were laid against the fourth plaintiff arising out of the shooting incident. However, this is no reason to doubt the version of events by the Metro Police Officers.
- [45] It is so that there are no objective facts whatsoever to support the defendant's version of the Metro Police officers being shot at. Their vehicle did not have bullet holes. It must be kept in mind that this was a scene in motion. The shooting took place prior to the vehicles coming to a halt. Warrant Officer Mabena, the plaintiffs'

own witness, also conceded that a revolver does not produce cartridge cases. These are probably some of the reasons why spent casings could not be found at the scene.

[46] There was no trace of the firearm used by the fourth plaintiff obviously because he immediately left the scene. Therefore, he had every opportunity to dispose of the firearm. The explanation given by the Metro Police Officers for not following the fourth plaintiff was that, it was dark, he disappeared into a bushy area and they feared for their safety as he was armed.

Findings

[47] I find that the Metro Police officers acted in self-defence. I find their evidence to be most probable than that of the fourth plaintiff. The witnesses called by the plaintiffs did not assist at all. None of them witnessed the actual shooting which forms the subject matter of this case. Secondly, they could not corroborate the plaintiffs'

evidence as they were unable to testify as to whether the bullet holes on the red Clio were as a result of gunshots emanating from

inside or outside the red Clio. This is evidence that required expertise.

The credibility of witnesses

[48] What may have appeared to be a good case on paper became less impressive particularly after cross-examination of the fourth plaintiff, the only witness who was the occupant of the red Clio available to testify.

[49] The fourth plaintiff gave evidence through an interpreter. He is not well-educated. He stated that he has never been to school. At the time of the incident he was employed as a gardener. He was not impressive as a witness and this cannot be attributed to his level of education or the lack thereof. He started mumbling during cross-examination. Counsel for the plaintiffs conceded that he was not impressive as a witness. He simply could not withstand cross-examination. While there may be some reservations about the fourth plaintiff's reliability on some points, there is no reason to doubt his evidence where it is fully corroborated by credible witnesses, documents and other objective facts.[7]

[50] The defendant's witnesses on the other hand, gave the impression of policemen who take their work seriously. They did not give the impression that they were not sympathetic with the plaintiffs. They were reliable and credible, and their evidence was logical. In the event of any inconsistencies, none were material to negate their testimony or to render it untruthful.

[51] For the above reasons, the version of the defendant's witnesses appears to be more probable, namely that the fourth plaintiff shot at the Metro Police Officers. When Constable Thoka shot at the red Clio, the fourth plaintiff had already started firing shots at them. I accept Constable Thoka subjectively and reasonably believed that he was entitled to shoot back in defence of his own life and that of his colleague. Constable Thoka had to act swiftly and decisively in an emergency. The deceased participated in creating the emergency by ignoring the signal by the Metro Police Officers to pull over. Instead, the deceased sped off.

[52] I am satisfied that the defendant has discharged its onus on a balance of probabilities. When its version is tested against the inherent probabilities, the indisputable facts and the credibility of all the witnesses, I can conclude that it is more credible and probable. It should therefore be accepted and that the other version be rejected as false.

[53] The only issue that remains to be decided is whether the means of defence adopted by Constable Thoka were commensurate with the danger confronting him and his colleague. This will be determined by looking at the circumstances of this case. To be considered is whether there were other options open to Constable Thoka, assuming he had the benefit of time for reflection. Counsel for the plaintiffs canvassed as alternative measures, that Constable Thoka could have fired a warning shot or directed the gunshots to the tyres of the red Clio. The situation that night was sudden and unexpected. The entire episode, from the time the Metro Police Officers signalled to the occupants of the red Clio to stop, to the time when the first shot was fired by the fourth plaintiff, was continuous. As conceded by counsel for the plaintiffs, it must have taken place within a very

short time span. There was absolutely no time for Constable Thoka to have reflected on different courses of defensive action available to him when the fourth plaintiff started shooting at them.

[54] Constable Thoka did not contemplate this tragic event. His actions must be considered within the context of the circumstances prevailing at the time. To argue that Constable Thoka in the circumstances such as those which prevailed, should not have fired shots at the red Clio, is the classic example of the armchair critic approach. In my view, the reasonable man in the position of Constable Thoka would have behaved no differently in the circumstances.

[55] It was argued further on behalf of the plaintiffs that firing ten shot at the red Clio was unreasonable. The Metro Police Officers were on duty and were performing their duties as traffic officers. In terms of s3(1)(b) of the National Road Traffic Act, 93 of 1996, any traffic officer may require the driver of a vehicle to stop his vehicle. The fact that the Metro Police Officers did not see the license disc where they would normally expect to see it, would entitle them stopping the red Clio. In determining whether in

attempting to stop the red Clio, Metro Police Officers were justified in taking the actions they did, must be investigated within the whole context of what transpired.

[56] Constable Thoka started firing shots after the fourth plaintiff fired shots at them. While they were ignoring instructions to stop, the fourth plaintiff had started shooting. Ten shots in total were fired by Constable Thoka. This may seem not to be proportional. Four of the ten bullets hit the red Clio. There was no way to prevent the occupants of the red Clio from fleeing. The red Clio seems to have been much faster than the Metro Police's NP 200 and could out speed it. The only reason the red Clio came to a halt is because the deceased had been shot at, otherwise, it is unlikely it would have stopped.

[57] The defendant proved justification for the force used. As it was stated in *Ramahala v City of Tshwane Metropolitan Municipality*[8], "...A suspect cannot be rewarded for breaking the law. The actions of the Metro Police Officers were lawful."

Dependants' Claims

[58] In respect of the first plaintiff and the two minor children, the question is whether the killing of the deceased was justified.

[59] The onus in this regard rests on the first plaintiff.

[60] In *Maimela and another v Makhado Municipality and another*[9] it was held:

"The basic ingredients of a claimant's cause of action in a claim for damages for loss of support are...'(a) [A] wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support.' Thus, questions of wrongfulness and fault come into the picture.

Without a wrongful act there can be no loss of support..."

[61] Considering the fact that the deceased did not fire any shots at the Metro Police officers, the defence of self-defence is not available to the Metro Police Officers. However, the defendant pleaded that the actions of the Metro Police Officers, in firing at the red Clio were necessary for their own protection. Unlike self-defence, necessity does not require the defendant's action to have been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was directed against an innocent person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against a dangerous situation[10].

[62] The circumstances of a case will determine whether the conduct of the defendant is covered by the defence of necessity. For an act to be justified on the ground of necessity the following requirements must be satisfied:

- a. A legal interest of the defendant must have been endangered,
- b. by a threat which had commenced or was imminent, but which was,
- c. not caused by the defendant's fault, and
- d. it must have been necessary for the defendant to avert the danger, and
- e. the means used for this purpose must have been reasonable in the circumstances.[11]

[63] The court in *Blos v Minister of Police* (114/2019) [2023] ZANWHC 126 (20 July 2023) held;

"[16] ... I do not propose to embark on an elaborate exposition on the differences between the defences of self-defence and necessity. It suffices to say that necessity, unlike self-defence, does not require the defendant's action to have been directed at the perpetrator of an unlawful attack. It is invoked where the action, or conduct, of the defendant was 'directed against an innocent

person for the purpose of protecting an interest of the actor or a third party (including the innocent person) against dangerous situation'. And whether or not the defendant's conduct would be covered by the defence of necessity will depend on all the circumstances of the case.

[64] It may well be that the deceased did not fire shots at the Metro Police Officers. However, when considering the circumstances of the case, it cannot be said that it was not necessary for Constable Thoka to avert the attack on himself and his colleague. Therefore, without a wrongful act, there can be no cause of action for loss of support. It follows therefore that, the dependants' claims brought by the first plaintiff cannot succeed.

Costs

[65] There is no reason to deviate from the general principle that costs follow the result.

Order

[66] In the result, I make the following order:

1. Issues of quantum and liability are hereby separated.
2. The plaintiffs' claim is dismissed with costs, such costs to include costs of counsel.

M R MOLELEKI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 29 November 2024.

Appearances:

For the Plaintiff: Mr. H.W Theron instructed by H.W Theron Inc. For the Defendant: Advocate Griessel instructed by Ric Martin Inc.

[1] Mabaso v Felix 1981

(3) SA 865 (A).

[2] Mdlalose & others v Masuku & another [2002] JOL 9415 (D) at page 10.

[3] (553/89)

[1992] ZASCA 104 (29 May 1992), Kumleben JA quoting from Ntanjana v Vorster and Minister of Justice 1950(4) SA 398 (C) 406A-C.

[4] Ntamo & Others v Minister of Safety and Security 2001(1) SA 830 (TKHC) at 836H-J.

[5] 51 of 1977.

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- [6] 1984(4) 437 (A) at 440E-441A.
- [7] April v Minister of Safety and Security [2008] 3 ALLSA 270 (SE) at par 14.
- [8] (75039/2019)
- [2022] ZAGPPHC 965 (12 December 2022) at par 39.
- [9] 2011
- (2) SACR 339 (SCA); (269/10) [2011] ZASCA 25.
- [10] Crown Chickens (PTY) Ltd t/a Rocklands Poultry v Rieck 2007(2) SA 118 (SCA) par 10.
- [11] Burchell Principles of Delict (1993) 75.
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